Date: December 7, 1998

IN THE MATTER OF:

Richard S. Schulman,
Complainant

Case No. 1998-STA-24

v.

File No. 01-0280-98-018

Clean Harbors Environmental Services, Inc.,
Respondent

For the Complainant:
Richard S. Schulman, *Pro Se*

For the Respondent:
Felix J. Springer, Esq.
Jonathan R. Black, Esq.

Before:
David W. DiNardi
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (hereinafter "the Act" or "the STA"), 49 U.S.C. §31105, and the implementing regulations found at 29 C.F.R. Part 1978 and 29 C.F.R. Part 18. Pursuant to the Act, an employee may file a complaint and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The following abbreviations shall be used herein: ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Complainant's Exhibit and EX for a Respondent's Exhibit.

On or about March 18, 1998, Richard S. Schulman (Complainant herein) filed a complaint of discrimination against Clean Harbors Environmental Services, Inc. (Respondent herein). (ALJ EX 1) Complainant alleged Respondent retaliated against him on February 24, 1998, when he was terminated from his position as a Class A Hazardous Waste Transporter. (CX 5; CX 6) The complaint was referred to the Office of Administrative Law Judges under cover of letter dated June 9, 1998. (ALJ EX 7) A hearing was held before the undersigned from September 8-10, 1998 in New London, Connecticut. (ALJ EX 7A) All parties were present, had the opportunity to present evidence and to be heard on the merits.

Post-Hearing Exhibits

Exhibit Number	Document Filed	Date Filed
CX 19	Copy of Certified Mail Receipt for witness' subpoena	09/08/98
ALJ EX 18	Letter dated September 17, 1998 to the parties with certain hearing exhibits enclosed	09/17/98
CX 20	Complainant's Driver Logs for January 25, 26, and 27, 1998 and recap sheet for month of January	09/18/98
CX 21	Complainant's Demand for Remedies	09/24/98
EX 22	Letter dated September 28, 1998 from Respondent's counsel establishing date for filing of post-hearing briefs	10/05/98
EX 23	Employer's Post-Hearing Brief	11/10/98
CX 22	Complainant's Post-Hearing Brief	11/16/98[1]

[1]Although the Complainant's Brief was not received until November 16, he fully complied with this Court's Order Establishing Briefing Schedule because he placed it in overnight mail on November 9 with an intended delivery date of November 10. The record was closed upon the filing of Complainant's brief.

Summary of the Evidence

The Complainant, who has been in the business of hauling chemicals for seven and a half years, was hired by Respondent on August 1, 1994 as a Class A Hazardous Waste Transporter based out of the Respondent's Bristol, Connecticut facility,[2] and was self-described as the number one class A drum pick up driver. (TR 32) The Respondent is engaged in the business of picking up hazardous waste from companies, referred to as the hazardous waste generators, and transporting the waste to the proper treatment and disposal facility. The Respondent's transportation equipment which is in need of repair is sent to the closest maintenance facility in Weymouth, Massachusetts, approximately 125 miles from the Bristol, Connecticut facility. There is, however, a mechanic on call in the Bristol area who is available to fix equipment any time.

According to Complainant, he was assigned to do the most difficult pick-ups with the worst equipment, and he always completed the job. The quality of his work was reflected in letters written by customers and in his performance reviews, none of which mentioned misconduct or insubordination. (CX 1; CX 2) He was also, however, the subject of employee warnings on August 19, 1997 (EX 2), December 1, 1994 (EX 5), and August 28, 1995 (EX 4)[3] and has received constructive criticisms in his performance evaluations. (CX 2L; CX 2Q) Mr. Gager described the Complainant as an employee who got the job done, but had to be prodded at times, was a little slow and selfish and took care of himself. He was, in other words, not a team player. (TR 635) The Complainant was compensated at the hourly rate of $13.92 and received basic insurance, 401K and medical/dental as fringe benefits. (TR 33)

In the last year of his employment, the Complainant's relationship with his supervisors, Northeastern Regional Logistics Manager David M. "Mickey" Bujak and District Logistics Coordinator James "Jim" Arthur Gager, became strained. According to Complainant, Messrs. Bujak and Gager, who were described by Complainant as having a lack of knowledge of truck driving in general, insisted that the drivers meet unreasonable time schedules in getting out of the yard in the morning and appearing at scheduled drum pick-ups. (TR 51-52; CX 9A; CX 9D)[4] In Complainant's

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[2]There were six drivers who worked out of the Bristol facility.

[3]There was also a written warning dated October 18, 1994 marked for identification but not admitted into evidence. (EX 3) The Complainant testified that he had never been given that warning and had never seen it prior to hearing. (TR 180-181)

[4]The documentary evidence revealed that at least two memoranda were issued which indicated that extensions for getting out of the yard had to be explained to Mr. Gager or Mr. Bujak (CX 9D; 9A) and Complainant testified that he did such explaining on numerous occasions. (TR 205-206) Complainant was never issued a written warning for requiring more than one half hour to leave the yard, although it was commented upon in two of his performance evaluations. (CX 2K; CX 2P) In this regard, the Complainant testified that he considered the comments in his personnel file regarding the length of time it took him to get out of the yard to be an extreme

opinion, Messrs. Bujak and Gager were "overlooking safety issues at that point in time" because they were not allowing enough time to complete a DOT required pre-trip inspection on the tractor trailer. (TR 52) He made these complaints about the half hour departure requirement to both Messrs. Bujak and Gager "at least twenty times..." (TR 56)[5]

At approximately 2:30 p.m. on Friday, January 23, 1998, the Complainant reviewed his run that was planned for Monday, January 26, 1998, and noted that he was scheduled to run his load with trailer 622. According to Complainant, he informed Mr. John Shambo, the Customer Service Account Manager who was the only person present in the office at the time, that the barn doors on trailer 622 were "no good" because the locking mechanism had been replaced with a 3/8 inch pin that bobbed up and down. (CX 15A; CX 15B)[6] Potentially, a drum or drums, which might legally weigh up to 882 pounds and which Complainant described having weighed in the 1500 pound area, could roll against the doors and push through them. (TR 72)[7] Complainant asked Mr. Shambo if he knew of any reason why the Complainant should not take trailer 682 instead of trailer 622, and Mr. Shambo allegedly responded that he did not. Complainant then left a note on the desk of Mr. Gager, whose usual schedule required that he work until 4:30 or 5:00 p.m. and whom Complainant presumed was somewhere in the facility despite the fact that he had not seen him all afternoon. The note, written on a yellow post-it note, read

> Loading trailer Monday morning, Taking 682 because I have ten stops, Give 622 to Kevin. Rick/Big Puff Daddy

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infraction on safety issues. (TR 54-55)

[5]Complainant also described incidents of log book violations, incidents where the amount of work assigned to the driver caused him or her to exceed the federally mandated number of hours he or she could drive in a twenty-four hour period. The Complainant did not, however, testify that he complained about log book violations to his supervisors.

[6]Although Mr. Gager testified that the pin pointed out by Complainant is a secondary lock (TR 642), Complainant testified that there is no such thing as a primary and secondary lock. (TR 692)

[7]Load bars, which are prescribed by DOT regulations, extend from one side of the trailer to the other and are a means of restraint. Trailer 622, which was an older trailer, was limited to a load bar which is held in place by the pressure it exerts on the walls. (TR 386-387) If a wall is dirty or oily, the load bar is going to slip. According to Mr. Gager, one would not load 622 flush to its doors and, therefore, one could use the load bar to secure the load. (TR 640) Complainant, on the other hand, testified that trailer 622 was loaded flush to its doors, such that "the doors just won't close" (TR 701) and that a load bar, which he has seen bend like a pretzel, does not hold in a load. (TR 206-207)

(EX 1) Complainant knew that trailer 682, which has roll-up doors, was assigned to another driver, Mr. Kevin Hurst. (TR 144) According to the Complainant, there was another half of the note, which was not produced as evidence but which was on another yellow post-it note. It read

If you have any problems with this, call me at home.

On Monday, January 26, 1998, the Complainant reported to work and took trailer 682. He did not see Mr. Bujak or Mr. Gager before leaving the yard. When Mr. Gager reported to work on Monday, January 26, he found Mr. Hurst looking for trailer 682. Mr. Gager did not see any note from Complainant, who had already left for his run. (TR 521) Mr. Gager testified he never saw the yellow post-it note or notes that Complainant maintained he left for him. (TR 628-629) When Complainant returned from his run and Mr. Gager inquired as to why he had switched trailers, Complainant stated that in order to get his run done, a run which included ten stops, he did not have time to open, close and secure the barn doors on trailer 622. (TR 523; 81)[8] He further informed Mr. Gager that he had left a note on his desk, informing him that he was taking trailer 682. According to Complainant, Mr. Gager gave him a written warning for taking equipment without Mr. Gager's approval either on the evening of February 26 or the morning of February 27. (CX 10E) Complainant refused to sign the written warning, insisting that he had notified Mr. Gager by leaving him the note which Mr. Gager presumably received.

According to Mr. Gager, the company policy in regards to trailer switching was made clear to the drivers through company meetings and discussions. The policy was described as critical to ensuring that all customer pickups are met. In fact, the Complainant's trailer switching on January 26, 1998, caused two customer pick-ups to be missed.

According to Complainant, there were "numerous occasions" on which he switched equipment and that he "swapped out all the time." (TR 75; 159)[9] Mr. Gager denied that other drivers had been swapping out equipment and runs without authorization. (TR 632)[10] Complainant testified that he telephoned Mr. Gager at home on one occasion in regards to the fact that a trailer assigned to him was full and Mr. Gager responded "what are you stupid? Grab the next one and go." (TR 159)

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[8]Mr. Gager, however, testified that he has made adjustments to a run when a driver runs out of driving time. (TR 530-531)

[9]According to Complainant, drivers were not only switching equipment but were also switching runs without the authorization of Mr. Gager.

[10]Mr. Gager held a meeting on February 17, 1998, and discussed the issue of switching equipment without authorization. He testified, however, that he stressed that equipment should not be switched for Complainant's benefit.

Mr. James Arthur Gager, District Logistics Coordinator for Respondent since January 1995, is responsible for the transportation and disposal of hazardous and non-hazardous waste. Prior to January 23, 1998, Complainant had expressed his displeasure with trailer 622 to Mr. Gager and his preference for trailer 682. Specifically, Complainant had informed Mr. Gager that he did not like the barn style doors on trailer 622 as they required more effort to open than a roll-top door. (TR 514; 517-518; 627) Mr. Gager usually assigned trailer 682 to Complainant, except on those occasions when it was not feasible or did not make sense in terms of load planning. Mr. Gager assigned Complainant trailer 622 for his run on January 26 because there was a light load planned and trailer 682 was needed for a larger load to be completed by Mr. Hurst.[11] Mr. Gager specifically informed Mr. Shambo about the truck assignments and the assignment of trailer 622 in particular because he had previously received complaints from Complainant about the inconvenience of the barn doors on trailer 622. (TR 517-518) The Complainant denied stating to Mr. Gager that he did not like to take trailer 622 because the barn doors did not close easily and explained that this complaint may have related to another trailer, the number of which Complainant could not recall. (TR 132)

Mr. John Scott Shambo, disposal service representative for Respondent and co-worker and friend of both Messrs. Gager and Bujak, is responsible for making telephone calls to customers, arranging to pick up their hazardous waste and completing the necessary paperwork. Mr. Shambo testified that he did not have a conversation with Complainant about the doors on trailer 622 and that he did not consent to Complainant taking trailer 682. (TR 474; 475-476; 493; 504) Early in the day on January 23, Mr. Shambo had a conversation with Mr. Gager wherein Mr. Gager informed him that he was leaving early. Mr. Gager also instructed Mr. Shambo to inform Complainant that he was to use trailer 622 and that Mr. Gager had already left for the weekend. Mr. Shambo conveyed both these facts to Complainant. (TR 474-475)[12] Mr. Shambo did not recall seeing Complainant leave a note on Mr. Gager's desk. (TR 508)

In a May 21, 1998 letter (CX 5A) and an April 17, 1998 letter (CX 5C) to the Occupational Safety and Health Administration (OSHA) investigator, Complainant failed to mention Mr. Shambo at all, despite the fact that in the latter the Complainant specifically discussed reviewing his assigned trailer and leaving the yellow post-it note. Similarly, Complainant failed to mention Mr. Shambo in his statement to unemployment compensation (CX 4I; 4J); in his March 16, 1998 letter to John J. Stanton, Jr., Area Director for the Hartford, Connecticut OSHA office (CX 6A-6B); or in his June 1, 1998 letter to Mr. Stanton, wherein Complainant specifically represented that he told his coordinator about taking another trailer on both occasions. (CX 6E-6F) The first time Complainant mentioned Mr. Shambo was in a July 28, 1998 affidavit submitted to the National Labor Relations Board (NLRB), in which Complainant mistakenly identified Mr. Shambo as a manager who is responsible for setting up driver runs. (CX 8J-8M)

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[11]Trailer 682 is six inches wider than trailer 622 and both are 48 feet long.

[12]Complainant denied that Mr. Shambo told him that Mr. Gager had gone for the day. (TR 702)

Complainant was again dispatched to use trailer 622 on Tuesday, February 17, 1998 and Mr. Gager testified that this was due to the fact that the run did not warrant assignment of trailer 682. Complainant testified that, at this time, trailer 622 was in a worsened condition because the ladder had been broken, there was steel hanging down from it and the bolts had rusted.[13] Complainant, who was already "short on hours as it was" because of a one and a half hour meeting held that morning,[14] observed the condition of the trailer, determined it was not fit to be driven and decided to take trailer 682 instead. (TR 163) The Complainant did not complete a pre-trip inspection report because it is required to be done only if the driver takes the equipment. The Complainant admitted that he did not notify anybody that he was taking a different trailer, but attributed this to a lack of time.[15] During the course of the run, Mr. Gager e-mailed Complainant on the truck's computer and stated

> Rick....You were scheduled to take 622 today,,,,,,I guess the meeting really worked....
> You took 682

Complainant responded

> Must need glasses, Looked at board before I left yesterday, Could've sworn it said 682!!!!!

(EX 6)

On Thursday, February 19, 1998, Complainant was dispatched to complete his run with trailer 679 which, upon inspection by Complainant, was in an unsafe state due to the fact that the liftgate

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[13]Mr. Gager testified that a ladder is not a major safety issue and that trailer 622 had two ladders, one on the left and one on the right. From the photographs (EX 19; EX 20), the one on the right "looks perfect." (TR 643) Complainant stated that he felt that the trailer was unsafe, although he acknowledged that not every driver would "feel that it was unsafe." (TR 693) Mr. Gager did not have a problem dispatching trailer 622 with a broken ladder and stated it was not a safety violation or a DOT violation. (TR 619; 626)

[14]Complainant testified that the company policy against equipment switching was an issue addressed during this meeting. (CX 10A) Mr. Gager included the issue because he wanted "to drive the point home" to Complainant who, according to Mr. Gager, was the only employee swapping equipment. (TR 528) **Supra**, at p. 4.

[15]Mr. Gager approximated that it requires one minute to walk the 150-200 yards to his office from the trailers. The Complainant estimated it would have taken him fifteen to twenty minutes to walk to the office, discuss the issue, and return to the trailer area.

support cross members were broken and badly rusted. Complainant noted this on a vehicle inspection report (VIR).[16] (CX 11A)

According to Mr. Gager, he informed Complainant in the late afternoon on Thursday, February 19, that he was going to give him another written warning and that the two of them would meet Friday morning, February 20. (TR 220-221, 536) On the evening of February 19, Complainant telephoned Mr. Gager at home and, as described by Mr. Gager, was ranting and raving about threatening to take Mr. Gager to the Labor Board and that Complainant's log violations were Mr. Gager's fault. (TR 539-540) He also complained that Mr. Bujak was not answering his pager, and Mr. Gager contacted Mr. Bujak and told him to call the Complainant. Complainant admitted that he did not raise any safety issues about trailer 622 with Mr. Gager. (TR 219; 540-542)

The Complainant spoke with Mr. Bujak on the telephone at approximately 9:00 p.m., informing him that trailer 622 was not fit to "haul feathers" and that he had taken a trailer that day which was "not up to snuff." (TR 96, 220, 657) Mr. Bujak denied hearing any comment about hauling feathers or safety concerns (TR 661), but informed the Complainant that the issue of the barn doors on trailer 622 would be discussed on Monday, February 23, 1998, which was the next day that Mr. Bujak would be in the office.

On the morning of Friday, February 20, 1998, Complainant was given a second written warning by Mr. Gager. (CX 10D) Complainant refused to sign the written warning and, after what Complainant described as "badgering" by Mr. Gager, Complainant told Mr. Gager he was not "not signing (expletive)," although he described the language he used as being used in "that office day in, day out, all the time." (TR 198, 544) Mr. Gager then telephoned Mr. Bujak and stated that he could not manage Complainant anymore and that he should be terminated. (TR 545, 565) Mr. Bujak agreed and indicated that he had to obtain approval from the human resources department in corporate office.

During the afternoon of Friday, February 20, 1998, Complainant inspected tractor 1172[17] and found that the back up alarm was not working, which is definitely a violation of company policy and possibly a violation of federal regulation. (TR 97) He noted this on the post-trip VIR (CX 11B; TR

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[16]The Vehicle Inspection Report (VIR) is a four part form used to record concerns, other than immediate safety concerns, concerning the road worthiness of a piece of equipment. (TR 577) One copy is kept by the driver, one is sent to central maintenance in Weymouth, one is sent to compliance or fleet safety, and one is retained in the local office. (TR 711-712) Mr. Gager receives VIRs on a daily basis and reviews them to determine whether or not there is a safety violation or out-of-service issue. (TR 551) Usually, there are minor items noted on VIRs, such as a scratches and dents.

[17]He was driving tractor 1172 with trailer 682.

226) and again noted the back-up alarm on Monday morning, February 23, 1998, in his VIR.[18] (CX 11D)

Mr. Gager did not see the February 19 VIR prior to his February 20 meeting with Complainant and ensuing decision to terminate him. (TR 552-553) The February 20, 1998 VIR concerning trailer 682 (CX 11B) was not seen until the late morning on Monday morning, February 23, and the February 23 VIR (CX 11D) was not seen until Tuesday, February 24. Driver "M Greenwood" indicated trailer 622 was in satisfactory condition in VIRs dated February 23 and March 2, 17 and 25 and June 10, 1998 (EX 14-18) and on June 11, 1998 and June 15, 1998, Mr. Dutkiewicz completed VIRs on 622 (EX 8; EX 9) and did not indicate any defect.

On Monday, February 23, 1998, Mr. Bujak drove past Complainant and a co-worker, Mr. Dutkiewicz, as he entered the yard.[19] Although Mr. Bujak saw the Complainant, he did not stop to discuss anything with him and Complainant departed the yard to complete his scheduled pick-ups. Approval for Complainant's termination was obtained this day and termination was scheduled for 12:00, February 24. Upon returning to the yard at the end of the day, the Complainant was informed that there would be a meeting the following day.

On February 24, 1998, the Complainant reported to the meeting, which was with Mr. Gager and Mr. Andrew Shakett, general manager for field service, and was terminated. Complainant, purporting to directly quote Mr. Gager, described the reason for his termination as "the result of [Complainant] refusing to sign two written warnings for taking another trailer, rather than trailer 622 on two separate occasions, which was considered insubordination in refusing to discuss this matter." (TR 101, 230) The company's termination documents indicate "cause - insub." (CX 3D) Mr. Gager recalled that he informed the Complainant that he was being terminated for insubordination when he failed to follow Mr. Gager's orders and was disrespectful. (TR 548; 593)[20]

Mr. David M. "Mickey" Bujak, Respondent's Northeastern Regional Logistics Manager for eleven years, is Mr. Gager's supervisor and is responsible for managing the transportation operation. Upon reporting to work on January 26, 1998, Mr. Bujak was approached by Mr. Hurst who could not find trailer 682. (TR 651-652) Mr. Bujak found Complainant's note, one piece of yellow post-it

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[18]He was driving tractor 1172 with trailer 698.

[19]This is corroborated by Mr. Dutkiewicz, who also testified that Mr. Bujak usually does not stop to talk to the employees. (TR 402)

[20]Mr. Gager testified that the Complainant was "terminated for insubordination and failure to follow proper instructions, *i.e.*, take trailer assignment" and that his "insubordination was upon the second written warning the verbal abuse that [Complainant] gave [Mr. Gager] and [Complainant's] attitude and what [he] w[as] going to do in the future..." (TR 593, 595)

(EX 1), after Complainant had departed on his route with trailer 682.[21] Mr. Bujak approved the written warnings which were to be issued to Complainant, and recalled that he approved the second warning at some time prior to February 19. Mr. Bujak did not think that Complainant was raising a safety concern during their telephone conversation on the evening of February 19; rather, his comments indicated that he did not like the barn doors which he described as difficult to close. (TR 656-657) The next day, Mr. Bujak consented to Mr. Gager's decision to terminate Complainant and sought approval from human resources and the legal department to ensure that he had not infringed on an employee's rights. (TR 659) He was also specifically informed that the company's progressive discipline policy did not apply to insubordination. Once Mr. Bujak was informed of what happened between Complainant and Mr. Gager on Friday morning, there was no longer any need for Mr. Bujak to discuss anything with Complainant and Mr. Bujak stated this was the reason that he did not stop to speak with the Complainant on Monday, February 23. (TR 662-663)

Mrs. Elizabeth Schulman, Complainant's wife of four years, overheard her husband make a telephone call to Mr. Bujak at approximately 9:00 p.m. on February 19 and discuss the fact that trailer 622 was not operable. Mrs. Schulman also recalled a statement about hauling chicken feathers and that her husband was upset. Mr. Bujak then hung up on the Complainant. According to Mrs. Schulman, Complainant put in very long hours for Respondent and it was stressful. (TR 323) When he was terminated, there was no money to pay the bills for the mortgage, car or food.

Complainant was awarded unemployment compensation benefits pursuant to Connecticut law (CX 4H), but he did not in fact receive any benefits because he had previously overcollected. (TR 116-117) Since April 20, 1998, he has been employed by Conway Transportation Systems and is presently earning $14.10 per hour.

Mr. Thomas Dutkiewicz, who has approximately thirteen years experience transporting hazardous waste, was previously employed by Respondent as a class A liquid driver and was supervised by Messrs. Gager and Bujak. Mr. Dutkiewicz described his relationship with Mr. Bujak as deteriorating when Mr. Bujak instructed Mr. Dutkiewicz that he could not talk about his previously filed whistleblower case, about safety issues, or "anything else related with the Surface Transportation Act." (TR 353) Mr. Dutkiewicz also noticed a pattern of favoritism in the way that Mr. Bujak issued assignments, assigning some employees to liquid loads while other employees were assigned drum loads. At one point, Mr. Bujak and Mr. Gager issued Mr. Dutkiewicz a verbal warning for not taking a trailer which Mr. Dutkiewicz maintained had no brakes. (TR 361-362) On June 15, 1998 Mr. Gager issued a written warning for insubordination based on a May 1998 incident, during which Mr. Dutkiewicz felt that Mr. Bujak had been harassing him and threatened to file a

[21]It is not clear why Mr. Bujak would have assisted Mr. Hurst in finding trailer 622 and found the Complainant's note at 6:30 or 7:00 (TR 653) and not told Mr. Gager, who testified he was helping Mr. Hurst find trailer 622 at 7:30. (TR 520-521) It is somewhat incredulous to this Judge that Mr. Bujak approved of the first written warning issued to the Complainant, and yet never told Mr. Gager of the note.

harassment charge.[22] (TR 359) Mr. Bujak testified that he was merely explaining to Mr. Dutkiewicz that he should inspect a load prior to filling out a manifest to avoid extra work and that Mr. Dutkiewicz told him he was not listening to him anymore. Mr. Dutkiewicz denied making this statement. (TR 462)

The company progressive discipline policy requires that a warning be issued within ten days of the offense. The manual, however, is specific in stating that progressive discipline applies to log book violations (CX 14G-I) and compliance violations. (CX 14V-X) According to Mr. Dutkiewicz, Mr. Bujak informed him that he was "putting three written warnings for insubordination and if a fourth one occurred," Mr. Dutkiewicz would be terminated. (TR 365; 428)[23] Mr. Dutkiewicz, who knew of no company policy or progressive discipline program for insubordination, was never given time off as a preliminary disciplinary measure.

In the Complainant's affidavit to the NLRB dated March 21, 1998, the Complainant stated that he was instructed by Messrs. Bujak and Gager "to treat Thomas Dutkiewicz differently then I was to treat my fellow employees. They directed me to maintain only a serious business relationship with him and to not have any casual interactions with him." (CX 8A) Shortly after certain news articles were published in local newspapers, Mr. Bujak instructed the Complainant that he did not care how Mr. Dutkiewicz was treated or what was done to him. According to the Complainant, Mr. Gager then instructed the Complainant that because future disciplinary actions would be taken against Mr. Dutkiewicz, all other drivers would more than likely be subject to stricter and more frequent disciplinary actions. (CX 8B) Mr. Gager informed the Complainant that all drivers would be subject to more stringent disciplinary actions so that it would not appear as though another whistleblower were being singled out for treatment. (TR 38)

It is the driver's responsibility, per federal law, to make a pre-trip and post-trip inspection of equipment. (TR 105) If, upon doing so, the driver notes defects in the equipment, it is reported to Mr. Gager, who has the responsibility of ensuring that the situation is remedied so that the equipment complies with federal law or that it is not necessary to cure the defect.

The question and guidance responses in the Federal Motor Carrier Safety Regulations Handbook (CX 7D) indicate that, in compliance with 49 C.F.R. 396.11, a driver is prohibited from operating a motor vehicle if the motor carrier fails to indicate on the driver's VIR and certify in writing that it effected repair of the defective or missing parts and accessories listed in Appendix G to the FMCSRs or that repair of the defect or deficiency was unnecessary. Similarly, certification

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[22]The written warning for insubordination was not issued until 26 days after Mr. Bujak and Mr. Dutkiewicz had their disagreement and a mere four days after the U.S. Court of Appeals issued its decision in the matter of **Clean Harbors Enviro. Serv., Inc. v. Sec'y of Labor**, 146 F.3d 12 (1st Cir. 1998). (TR 359)

[23]Mr. Bujak denied informing Mr. Dutkiewicz that four written warnings for insubordination were required before a driver could be terminated. (TR 666)

must be made that all reported defects or deficiencies have been corrected or that correction was unnecessary for trailer repairs.

The Respondent's Transportation Manual provides that a driver should not depart on a trip with equipment that is not mechanically and structurally sound, and in full compliance with all applicable DOT regulations and specifications, 49 C.F.R. Parts 393 & 396 in the *Federal Motor Carrier Safety Regulations*. The Manual further provides that a VIR must be performed pre- and post- trip, but that a driver may use the previous day's VIR for that day's work if no defects are noted on the report and the driver is satisfied that the vehicle is in safe operating condition. If defects were noted on the previous day, the driver signs the previous day's VIR only after he is satisfied that the defect has been corrected. At the end of the day, a VIR must be completed whether or not there are defects. If there are defects noted, the driver is to immediately inform the appropriate management official, who must ensure that the defect is repaired prior to the dispatch of the vehicle. (CX 14B-C)

Discussion

This case proceeded to a full hearing on the merits. Accordingly, examining whether or not Complainant has established a *prima facie* case is no longer particularly useful and this Administrative Law Judge shall consider whether, viewing the evidence as a whole, the Complainant has shown by a preponderance of the evidence that he was discriminated against for engaging in protected activity. **See Byrd v. Consolidated Motor Freight**, 97-STA-9 (ARB 05/05/98). To carry that burden, Complainant must prove that Respondent's stated reason for terminating Complainant is pretextual, *i.e.*, that it is not the true reason for the adverse action and that the protected activity was the reason. **St. Mary's Honor Center v. Hicks,** 509 U.S. 502, 506-508 (1993). It is not sufficient that Complainant establish the proffered reason was unbelievable; he must establish intentional discrimination in order to prevail. **Leveille v. New York Air Nat'l Guard**, 94-TSC-3/4, at p. 4 (Sec'y 12/1/95) (adjudicated pursuant to an analogous whistleblower protection statute).

A protected activity within the purview of the STA is established by proof that

> (A) the employee...has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because--
>
> (i) the operation violates a regulation, standard or order of the United States related to commercial vehicle safety or health; or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. §31105.

For purposes of §31105(a)(1)(A), a safety related complaint to any supervisor, no matter where he or she falls in the chain of command, can be protected activity. **Zurenda v. J&K Plumbing & Heating Co., Inc.**, 97-STA-16 (ARB 06/12/98). Protection is not dependent on actually proving a violation of a regulation; the complaint need only relate to such a violation. **Byrd**, **supra**, at p. 5. An employee's motivation in making a safety complaint has no bearing on whether or not the complaint is protected. **Nichols v. Gordon Trucking, Inc.**, 97-STA-2 (ARB 07/17/97) (**citing Pooler v. Snohomish County Airport**, 87-TSC-1 (Sec'y 02/14/94)). When an employee complains about the condition of a truck, initially refuses to drive it but eventually does drive it, the incident is more appropriately analyzed under the complaint provision rather than the refusal to drive provision of the STA. **Zurenda**, **supra**, at p. 5.

For purposes of §31105(a)(1)(B), the employee's refusal to drive must be caused by concern about the vehicle's unsafe condition. **See Generally Nichols**, **supra**, at p. 7 (dismissing claim based, in part, on the evidence that the complainant's actions were focused solely on his desire to avoid any further aggravation of his back condition rather than on any desire to promote highway safety); **Zurenda**, **supra**, at pp. 5-6 (where the complainant refused to drive a Mack truck because he did not want to stay at the company apartment for three nights). It may be that the employee refused to drive not out a concern for truck safety, but solely because of a non-safety related reason. Section (a)(1)(B)(i) requires that a complainant "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he or she refused to drive -- a mere good faith belief in a violation does not suffice." **Byrd**, **supra**, at p. 7 (**citing Yellow Freight Systems v. Martin**, 983 F.2d 1195, 1199 (2d Cir. 1993)).

Section (a)(1)(B)(ii) focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he or she drove. This section requires that the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. 49 U.S.C. §31105(a)(2). **See Generally Cleary v. Flint Ink, Corp.**, 94-STA-52 (Sec'y 03/05/96) (dismissing the complaint based, in part, on the fact that complainant never sought correction of an allegedly unsafe condition).

This Judge concludes that the Complainant has failed to prove intentional discrimination by a preponderance of the evidence. Although Complainant engaged in protected activity, his allegation of retaliation fails because he has not proven a causal link between the protected activity and his ultimate termination. This Judge notes that the parties presented significantly different factual accounts of some of the occurrences leading to this complaint. This Judge, having heard the testimony of the witnesses firsthand and having reviewed the entirety of the documentary evidence, has rendered specific factual findings and articulated the reasons therefor. **See Generally BSP Trans., Inc. v. U.S. Dep't of Labor**, ___ F.3d ___ (1st Cir. 1998), 1998 WL 754697 (reversing the Board's final decision and order where the administrative law judge's factual findings were supported by substantial evidence).

According to Respondent, it was only subsequent to Complainant's termination that he raised complaints about trailer 622 and that, even if these complaints were made prior to the Complainant's

termination, they were not safety-related. This Judge finds, however, that the Complainant's testimony established that he had raised complaints with Mr. Gager about the length of time allowed for DOT mandated pre-trip inspections at some date prior to January 26, 1998. He had, therefore, engaged in protected activity, 49 U.S.C. §31105(a)(1)(A), and the Respondent was aware of it.

Furthermore, the Complainant engaged in protected activity on February 19, 20 and 23, when he expressed safety-related concerns in VIRs. Mr. Gager testified he saw the February 19 VIR at some time on February 20; the February 20 VIR at some time on February 23; and the February 23 VIR at some time on February 24. The fact that Respondent may not have known about these VIRs until after it made its decision to terminate Complainant is a factor more appropriately considered in determining the motivation for Respondent's decision. It does not deprive the VIRs themselves of their status as protected activity.

In its post-hearing brief, the Respondent argued that the concerns as specified by the Complainant in these VIRs did not present safety issues because the DOT regulation pertaining to *Parts and Accessories Necessary for Safe Operation* does not address liftgates or back-up alarms. 49 C.F.R. Part 393. The DOT regulation pertaining to inspection, repair and maintenance, however, does require that "[p]arts and accessories shall be in safe and proper operating condition at all times. These include those specified in part 393 of this subchapter and any additional parts and accessories which may affect safety of operation, including but not limited to, frame and frame assemblies, suspension systems, axles and attaching parts, wheels and rims, and steering systems." 49 C.F.R. Part 396.3(a)(1). Furthermore, the Complainant testified that he knew the back-up alarm was a violation of company policy and that it "might be" a violation of DOT regulation. (TR 97)

Apart from these VIRs, the Complainant engaged in protected activity on February 19 when he telephoned Messrs. Gager and Bujak at home and asserted his rights under the STA. Mr. Gager admitted that, during his conversation with the Complainant, the Complainant blamed Mr. Gager for log book violations and this Judge finds that Complainant, based on the testimony of Complainant and his wife, maintained that trailer 622 was "not fit to haul feathers" during the course of this conversation. Although the conversation between Mr. Bujak and Complainant may have also included a comment by Complainant that the trailer he had taken that day was "not up to snuff," this is not sufficiently related to the STA to constitute protected activity within the meaning of the statute. **See Generally White v. Maverick Transp., Inc.**, 94-STA-11 (Sec'y 02/21/96).

This Judge finds, however, that the Complainant did not engage in protected activity under the refusal to drive provision of the STA. In this regard, I note that the Complainant's action of taking a trailer not assigned to him on January 26, 1998 and February 17, 1998, allegedly for safety related reasons, cannot be protected under this section of the STA. This is because he never communicated his concerns to the Respondent prior to switching the equipment and, therefore, never allowed the Respondent an opportunity to correct the allegedly unsafe condition. In fact, the Complainant never completed a VIR in regards to the makeshift locking mechanism on trailer 622. The first time he communicated a safety concern about trailer 622 was during his telephone conversation with Mr. Bujak on February 19.

The Complainant erroneously argued that he engaged in protected activity on January 26, 1998 and on February 17, 1998, when he did not take trailer 622 to complete his assigned run. During the hearing of this matter, the Complainant noted that the company policy provided that a driver should not depart with equipment that he deems unsafe for operation. (TR 702) This trailer switching did not, however, constitute protected activity because this Judge finds that the trailer switching on those dates was not safety-related.

The yellow post-it note Complainant left on January 26, 1998, did not express any safety concern and, in fact, suggested giving the trailer to another driver. **See Generally Auman v. Inter Coastal Trucking**, 91-STA-32 (Sec'y 08/06/92) (finding that the complainant's failure to list the tire defect in his daily log when he first noticed it, given that he habitually did so in the past, undercut his testimony that his refusal to drive was based solely on the safety of the vehicle). Complainant testified that his note was meant to convey to Mr. Gager that "it would be too time consuming to use trailer 622 because of the [barn] doors..." (TR 146) He later contradicted himself by explaining that barn or roll-up type doors are irrelevant because 65% of pick-ups are at remote locations and, in the circumstance of such a location, barn doors are easier to open. (TR 149-150)

Furthermore, this Judge finds that this single piece of yellow post-it note was the entirety of the note left by the Complainant because it was ended by Complainant's printed name. Even if there was a second half to the note which invited Mr. Gager to telephone the Complainant at home if there was a problem with him taking trailer 682, this does not amount to the Complainant obtaining consent for switching the equipment. Complainant testified that he usually got to the yard before Mr. Gager and returned after he had left. (TR 300-301) On this day, Complainant merely presumed Mr. Gager was still on the premises and that he would receive the note. In addition, the Complainant testified that Mr. Shambo is not able to give him permission to substitute equipment and that this is Mr. Gager's responsibility. (TR 123, 133, 138) Therefore, this Judge finds that the Complainant did not obtain the Respondent's consent prior to switching trailers and he did not engage in protected activity on January 26.

In regards to the trailer switching on February 17, the Complainant testified he did not take trailer 622 on that day because it was not fit to be driven based upon his pre-trip visual inspection. It is a fact, however, that when Mr. Gager electronically communicated with the Complainant on the truck's computer that very day, the Complainant, instead of raising safety-related concerns, responded that he needed glasses and that he incorrectly read the trailer number. (EX 6) Therefore, he did not engage in protected activity on February 17.

The Complainant failed to prove the causal link that is essential to a successful STA claim. Complainant heavily stressed the temporal proximity of his safety concerns and ultimate termination. Proximity in time between protected activity and an adverse action is solid evidence of causation. **White v. The Osage Tribal Council**, 95-SDW-1 (ARB 8/8/97). **See Also Carson v. Tyler Pipe Co.**, 93-WPC-11 (Sec'y 03/24/95).

This Judge is unpersuaded by Complainant Schulman's argument. A careful review of the sequence of events reveals that although Respondent's decision to terminate the Complainant was

made prior to the time that it learned of the VIRs, it was made in close proximity to the February 19 telephone call. This Judge finds and concludes that this temporal proximity, standing alone, is not sufficient to satisfy the Complainant's burden of proving intentional discrimination by a preponderance of the evidence, especially in light of the countervailing evidence which I shall now discuss.

This Judge finds that the Complainant's concerns, as raised in his VIRs and during the telephone call, were not of such a significant nature that they would motivate the Respondent to retaliate against the Complainant. **See Generally Nichols**, **supra**, at p. 7 (holding the complainant's activities were of such minor significance that they were unlikely to have motivated any desire by the respondent to retaliate against the complainant). In this regard, the evidence established that every driver submitted VIRs on a regular basis with maintenance or repair suggestions. (TR 297) Indeed, the Complainant testified that he had cited issues on his VIRs over the course of his employment with Respondent while under the supervision of Mr. Gager. There was not, however, an extreme amount or overflow in the year preceding his termination. (TR 580-583)

The Complainant maintained that he was informed, within the last two months of his employment, that Mr. Gager would be stricter on established policy and run a "tight ship" on an "even keel" due to the return of Mr. Dutkiewicz. According to Complainant, Mr. Gager stated Mr. Dutkiewicz should be treated like everyone else. (TR 600, 603)

The evidence presented at hearing established that Mr. Dutkiewicz was not disciplined for the repairs he identified in VIRs dated April 1, 1998 and June 17, 1998, both of which were submitted to Mr. Gager. (CX 12A; CX 12B)[24] Mr. Dutkiewicz also testified that he would report safety issues on VIRs on a daily basis and that these would be turned into Mr. Gager. (TR 437) Mr. Dutkiewicz has never been approached by Mr. Gager about any of the issues he raised on those VIRs.

Mr. Gager most succinctly and credibly testified that he would have no drivers if he issued a termination or warning to every driver who expressed a safety complaint. (TR 554) This Judge finds that this testimony, as corroborated by Mr. Gager's actions in regards to Mr. Dutkiewicz, is genuine.

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[24]On April 1, 1998, Mr. Dutkiewicz completed a VIR in regard to the leaking hydraulics and the cracked or missing pieces on trailer 679's liftgate. (CX 12A) He nevertheless used the trailer, because he did not have to use the liftgate and the trailer itself was safe to go over the road. (TR 389; 393) On June 17, Mr. Dutkiewicz completed another VIR on trailer 679, noting missing lights, dangerous cracks and missing parts on the liftgate, and that the rear door would not properly shut. He took the trailer out of service. (TR 395; CX 12B) Mr. Dutkiewicz was not disciplined for his concerns as expressed in these VIRs, both of which were submitted to Mr. Gager. On June 17, trailer 679 was put out of service, Mr. Dutkiewicz subsequently brought it to the mechanics at the Respondent's request, and he has not seen it since. In an April 27, 1998 VIR, Mr. Dutkiewicz indicated a problem with trailer 679's landing gear and missing lights on the nose of the trailer. (EX 7) He did not, however, make further mention of the liftgate and he did not indicate that the trailer was unsafe for operation.

Accordingly, I find and conclude that the Complainant did nothing more than continue, as he had done in the past, to report maintenance or repair suggestions on VIRs. This Judge does not infer any illegitimate motive from the fact that Mr. Gager expressed that the ship was tightened upon Mr. Dutkiewicz's return to employment with Respondent because an employer is not prohibited from strictly applying its policies and procedures; rather, it is prohibited from applying them disparately to employees who engage in protected activity. There is no evidence in this case that the tightened ship was run unevenly or unfairly.

Evidence regarding a respondent's encouragement that drivers air their safety concerns has been recognized as relevant evidence in determining that the STA has not been violated. **See Andreae v. Dry Ice, Inc.**, 95-STA-24 (ARB 07/17/97) (holding that evidence that an employer routinely encouraged employees to make written reports of safety defects is highly relevant evidence that militates against a finding of retaliatory motive). *A fortiori*, this Judge deems evidence that a respondent discourages the reporting of safety concerns as evidence of discriminatory intent. Such evidence, although not dispositive in and of itself, is relevant to the inquiry if it can be shown that it has some bearing on the case under consideration.

In this matter, the Complainant has introduced testimony from Mr. Dutkiewicz and the decisions rendered by the Department of Labor and the First Circuit on Mr. Dutkiewicz's STA complaint in an effort to establish the Respondent's method of addressing safety complaints. Although Mr. Dutkiewicz alleged discriminatory conduct by employees in the Bristol, CT facility, to which he was assigned in October 1994, his supervisors were persons not involved in the matter under consideration. Furthermore, his complaint concerned actions occurring prior to January 16, 1995. (CX 17) For these reasons, this Judge finds Mr. Dutkiewicz's earlier allegations of little value in the present inquiry.

Mr. Dutkiewicz's more recent allegations as levied against the Respondent named herein (EX 12), which arise out of January 30, 1998 and February 10, 1998 written warnings (EX 10; EX 11), never proceeded to a full hearing. Rather, they were the subject of withdrawal and dismissal with prejudice. (EX 13) This Judge declines to conduct a hearing within a hearing, and finds that Mr. Dutkiewicz's testimony at the hearing of this complaint was not sufficient to establish a pattern of discouraging the expression of safety-related concerns.

The Respondent maintained that Complainant was terminated for legitimate, non-discriminatory reasons, *i.e.*, he was terminated for twice violating company policy: once on January 26, 1998 and again on February 17, 1998. In fact, Respondent noted, the violation on February 17, 1998, immediately followed a meeting during which the issue of equipment switching was addressed. The documentary evidence of record revealed that the Complainant was terminated for insubordination. (CX 3D) Mr. Gager explained that the Complainant was insubordinate when he failed to follow Mr. Gager's orders in regards to trailer assignments and was disrespectful with verbal abuse and attitude. (TR 548, 593, 595)

Even when an employee has engaged in protected activity, an employer may legitimately discharge the employee for insubordinate behavior, work refusal and/or disruption unless the

insubordination was the result and manifestation of the protected activity. **Saporito v. Florida Power and Light Co.**, 89-ERA-07/17 (ARB 08/11/98) (**citing Abu-Hjeli v. Potomac Elec. Power Co.**, 89-WPC-01 (Sec'y 09/24/93); **Dodd v. Polysar Latex**, 88-SWD-04 (Sec'y 09/22/94)). An employer may terminate an employee for any reason, good or bad, or for no reason at all, as long as the employer's reason is not proscribed by a Congressional statute. **See Kahn v. Sec'y of Labor**, 64 F.3d 271 (7th Cir. 1995), 92-ERA-58.

The Complainant argued that the Respondent's act of terminating him for insubordination did not conform to its progressive discipline policy as set forth in the company manual. In support of this argument, he relied on the testimony of Mr. Dutkiewicz, who testified that Mr. Bujak informed him that he was "putting three written warnings for insubordination and if a fourth one occurred," Mr. Dutkiewicz would be terminated. (TR 365; 428) Mr. Bujak denied informing Mr. Dutkiewicz that it would take four written warnings for insubordination before a driver could be terminated. (TR 666)

The Disciplinary Actions section of the Respondent's Transportation Manual provides that situations not discussed in that section will be addressed by members of the Transportation Review Committee and that terminations must be issued within 24 hours of notification. (CX 14V-W) It does not, however, define insubordination or the appropriate discipline for it. The Manual further provides that "The company reserves the right to terminate an employee immediately when an employee's conduct warrants immediate termination's (sic)." (CX 14X)

This Judge credits the testimony of Mr. Gager on this contested fact and finds that he never informed Mr. Dutkiewicz that four written warnings would be required prior to termination for insubordination. Mr. Gager's testimony was corroborated not only by the written Manual, but also by the evidence that other employees had been similarly terminated for insubordination. Four of Respondent's employees were terminated for insubordination in 1993; three in 1994; one in 1995; three in 1996; one in 1997; and three in 1998 (including the Complainant). (EX 21; CX 13B-C) Respondent's general counsel testified at hearing that four written warnings were not required for any of these terminations. (TR 720)

Even if Mr. Gager did inform Mr. Dutkiewicz that four written warnings were required prior to termination for insubordination, this does not automatically indicate action in violation of the STA. A complainant must still prove that the failure to apply a progressive discipline policy was illegitimately motivated. **See Collins v. Florida Power Corp.**, 91-ERA-47 (Sec'y 05/15/95) (wherein the Secretary rejected the complainants argument that the respondent should have applied the company's progressive discipline policy rather than terminating them and instead found that there was no evidence in the record to support a conclusion that respondent failed to apply progressive discipline for illicit reasons).

In this case, the evidence established that the Complainant was terminated only after he had twice been insubordinate in refusing to follow the policy against switching equipment, the second instance of which immediately followed a meeting reiterating the policy, and only after he had made it clear to his immediate supervisor, by the use of foul language, that he would not be managed.

The Complainant argued that Respondent considered the VIR which took trailer 679 out of service as insubordinate conduct because the VIR was in his personnel file as produced by Respondent during investigation by OSHA. General Counsel to the Respondent convincingly testified at hearing, however, that the VIR was merely included in a red rope file that was in his office due to the investigation of this complaint. The file included the Complainant's personnel file and a file of his VIRs. General Counsel explained that an office support person must have mistakenly commingled the files during photocopying.

Even if this Judge were to find that the evidence presented herein were sufficient to establish that the Respondent's decision to terminate the Complainant was motivated in part because of the Complainant's protected activity, the Complainant would nevertheless fail under the dual motive analysis. Under the dual motive analysis, a complainant must initially prove, by a preponderance of the evidence, that a respondent took adverse action in part because the complainant engaged in protected activity. **Shannon v. Consolidated Freightways**, 96-STA-15 (ARB 04/15/98); **Logan v. United Parcel Service**, 96-STA-2 (ARB 12/19/96). Where the complainant has shown that the challenged employment action was motivated at least in part by an impermissible criterion, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the illegitimate factor. **Carroll v. U.S. Dept. of Labor**, 78 F.3d 352 (8th Cir. 1996) (**citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle**, 429 U.S. 274, 287 (1977); **Price Waterhouse v. Hopkins**, 490 U.S. 228, 258 (1989)).

The Respondent in this case has met its burden and this Judge finds and concludes that it would have terminated the Complainant for insubordination even if he had not engaged in protected activity. It is plain that something must have spurred the Complainant to telephone Messrs. Bujak and Gager on the evening of February 19. The Complainant explained that he made the telephone call to complain about the condition of trailer 622. He had not, however, been assigned to make a run with that trailer since February 17, a day on which he took trailer 682 and explained that it was due to other than safety-related reasons. This Judge more logically infers that Complainant telephoned Messrs. Gager and Bujak on the evening of February 19 because Mr. Gager had orally notified the Complainant, earlier in that day, that he would be receiving a second written warning on February 20.

A complainant's motivation in lodging a safety complaint has no bearing on whether or not that complaint is protected activity. **Nichols**, **supra**. Accordingly, the Complainant's reason for making the telephone call on the evening of February 19 is not relevant to the determination of whether or not the concerns expressed therein constituted protected activity and, as this Judge has already found, the telephone call did include protected activity. The reason for the Complainant's telephone call, however, is vitally important in determining whether or not the Respondent would have terminated the Complainant even if he had not engaged in that or other protected activity.

This Judge finds it significant that the Respondent did not initially attempt to terminate the Complainant on the morning of February 20; rather, Mr. Gager, *consistent with his previously stated intention to issue a written warning*, sought to issue the second written warning to Complainant for the unapproved trailer switching. The decision to terminate the Complainant was reached by Mr.

Gager only once it became apparent that Complainant could not be managed when he refused to sign the warning and said he would not sign (expletive). The logical inference to draw from this unfolding of events is that Respondent would have decided to terminate Complainant for the insubordinate conduct even if he had not engaged in protected activity.

Conclusion

In the first instance, this Judge concludes that Complainant has failed to prove intentional discrimination by a preponderance of the evidence. This Judge, assuming that there is sufficient evidence to prove that Complainant's termination was caused in part by an illegitimate motive, further concludes that Complainant's insubordination created sufficient justification for his termination. Respondent has proven, by a preponderance of the evidence, that the insubordination would have led to Complainant's termination even if he had not engaged in protected activity. Accordingly, this Judge hereby **RECOMMENDS** that the foregoing complaint be **DISMISSED**.

DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jw

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. **See** 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978 (1996).